*United States Court of Appeals*

*for the Second Circuit*

# APPELLANT'S REPLY BRIEF

75-7008

12/17

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7008

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P/S

STUART A. JACKSON,

Plaintiff-Appellant,

v.

JACK OPPENHEIM,

Defendant-Appellee.



REPLY BRIEF OF PLAINTIFF-APPELLANT

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## PRELIMINARY STATEMENT

Defendant-appellee Oppenheim's answering brief does not take issue with appellant's exposition of the applicable precedents governing Section 12(2) liability. Defendant, however, contends that Section 12(2) is not applicable because, although defendant may have failed to exercise reasonable care to avoid the omission to disclose material information, he had no duty under Section 12(2)

to make such disclosures because he made no affirmative statements of any kind which were rendered misleading by the otherwise material omissions. Defendant's argument must be rejected because it proceeds upon an assertion of facts not supported by the record, and a narrow construction of Section 12(2) which should be rejected.

With respect to the issue of attorneys' fees, defendant's brief ignores the policy issue raised in appellant's brief which has never been considered in this Circuit. Defendant urges this Court to approve the award of attorneys' fees below under a boilerplate collection provision in a note without consideration of the extent to which the fees were incurred in defense of a securities law claim. Neither defendant's brief nor the authorities cited therein adequately discuss the deterrent effect of such an award which turns in all instances upon the happenstance of whether the purchase and sale of securities involved installment payments. Defendant's request for affirmance of the judgment below with respect to the Section 12(2) claim rests solely upon urging this Court to consider a question of first impression. To hold that a plaintiff who has raised such a serious and meritorious question with respect to the securities laws may be penalized by an award of attorneys' fees in favor

of a successful defendant will have a deterrent effect on the prophylactic purposes underlying Congress' enactment of the securities laws.

Defendant has also seen fit to encumber the Court and appellant with a lengthy statement of facts, the relevance of which is never developed in defendant's legal argument. The facts set forth at length by defendant were concededly relevant to the trial court's findings under the 1934 Act with respect to the issues of plaintiff's access to corporate information and plaintiff's duty to conduct a reasonable investigation. These issues, however, are completely irrelevant to a determination of the plaintiff's actual knowledge for purposes of Section 12(2). In addition, apparently aware of the weakness of defendant's legal argument, the statement of facts takes liberty with the record in raising certain wholly irrelevant matters for the apparent purpose of suggesting improper conduct by plaintiff. Point III is included in this brief solely to set the record straight.

## POINT I

## SECTION 12(2) IS APPLICABLE TO DEFENDANT'S FAILURE TO DISCLOSE MATERIAL FACTS

Defendant concedes that plaintiff's main brief correctly states the applicable rules established by the courts with respect to Section 12(2) of the 1933 Act. He contends, however, that the judgment below should be affirmed solely on the ground that defendant is guilty only of complete non-disclosure and, therefore, the Court lacks jurisdiction under Section 12(2) because the duty to disclose is triggered only where the defendant makes some affirmative statement. Thus, defendant argues that there is no liability for mere silence even when an insider seller is aware that the purchaser may lack actual knowledge of material corporate information known to the insider seller.

Defendant's brief concedes the applicability of the following legal principles discussed in plaintiff's main brief:

1. Plaintiff's burden of proof is limited to establishing:

a. a misrepresentation of material fact or the omission to state a material fact; and

b. plaintiff lacked actual knowledge of the misrepresentation or omission.

2. Plaintiff is not required to demonstrate scienter on the part of defendant.

3. Plaintiff is not required to demonstrate reliance or reasonable care on his own part.

4. Defendant is required to prove that he could not have avoided the misrepresentation or omission by the exercise of reasonable care.

Furthermore, defendant's brief does not take issue with the factual finding in the court below that certain information in plaintiff's memorandum (Ex. 1, E.1)* was material corporate information (A.41-42; Jackson 19-20).** Defendant also concedes the finding of the court below that Jackson lacked actual knowledge of this material information (A.38-49; Jackson 20-21).

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* All material appearing in the Joint Appendix is cited by reference to the page of the Appendix at which said material is reproduced (*e.g.*, "A.__") except that citations to exhibits are cited by both the exhibit number and the page of the Exhibit Volume (*e.g.*, "Ex.__, E.__").

** Plaintiff-appellant's main brief dated November 3, 1975 will be cited "Jackson", followed by the page to which reference is made. Defendant-appellee Oppenheim's answering brief dated December 3, 1975 will be cited "Oppenheim".

Finally, the court below dismissed the Section 12(2) claim solely on the ground that defendant had exercised reasonable care notwithstanding his failure to disclose the material information (A.49). Plaintiff's main brief carefully analyzes the record to demonstrate that the holding of the trial court cannot be sustained because Oppenheim admitted that he made no inquiry and took no steps to determine whether Jackson was in possession of all material facts concerning the company as of the date of sale in April 1970 (Jackson 21-25). Defendant's brief tacitly admits that the holding in the trial court is wholly improper because there is no attempt in defendant's brief to sustain the judgment below on the ground relied upon by the trial judge (Oppenheim 16-25).

## A. The Record Does Not Support Defendant's Claim That He Maintained Complete Silence

Assuming that defendant's brief accurately states the law with respect to silence or complete nondisclosure, it is respectfully submitted that defendant's brief proceeds on a complete misreading of the record in this case and the opinion below.

Defendant knew in April 1970 at the time of the sale to Jackson that he and other members of Chelsea management had made prior optimistic statements in plaintiff's presence concerning the financial condition and future prospects of the company. He also knew that the radical change in circumstances described in his March 1970 memorandum, prepared only two weeks before the sale, was clearly material to any prospective investor because it was these facts which had led Oppenheim himself to make the investment decision to dispose of his interest in Chelsea House. Thus, defendant's brief ignores the following undisputed facts in the record:

A. In the period April through June 1969 Jackson knew that Oppenheim believed the company was extremely economically viable and he was extremely optimistic about the future prospects of the company (A.395-96; Jackson 8);

B. Jackson knew that Oppenheim concurred in the management decision to reject the offer of Herzfeld & Stern to underwrite company stock at $7.00 per share because management, including defendant, believed the stock was worth $10.00 per share (A.397-98; Jackson 8);

C. Defendant knew that Jackson was aware in the fall of 1969 that the management of Chelsea

had rejected an offer by a second underwriter, Herbert Young & Co., to underwrite the stock at $7.00 per share on the ground that the stock was worth at least $10.00 per share (Oppenheim 6);

D. Oppenheim was aware that in January 1970 Jackson had received the audited financial statement for the year ended October 31, 1969 which showed that the company's current assets slightly exceeded its current liabilities (Oppenheim 6-7; Ex. B, E.139, 141). Although defendant admitted that Norman, comptroller of the company, had orally advised defendant in February or March 1970 that the company's current liabilities by then exceeded its current assets by $500,000 to $600,000, defendant admitted that he had no recall of presenting that fact to Jackson at the March 13 meeting barely three weeks before the sale to Jackson (A.421-22);

E. Defendant's own recitation of his conversation with Jackson on March 13, 1970 demonstrates Oppenheim's efforts on that day to convince Jackson that the company could still prosper if only management would replace Steinberg as president (A.281, 415-16; Jackson 11).

F. Oppenheim further admitted, after considerable evasion, that he did not tell Jackson on March 13 the critical reason for Bache's withdrawal from the private placement, namely, that Norman, the chief financial officer of the company, was unable to produce accurate cash flow projections for the company. This omission was particularly egregious because Oppenheim admitted that Jackson's response to Oppenheim's request for help in replacing Steinberg was that Oppenheim should have Norman call Jackson with respect to the problem because Jackson had great confidence in Norman (A.426-28).

G. Finally, Oppenheim's duty to make disclosure must be gauged in light of his admitted knowledge that Steinberg, the president of the company, with whom Jackson usually dealt was not likely to be truthful about the company's performance but, rather, tended to insist that things were going well no matter how serious the problems facing the company (A.438-39).

It is respectfully submitted, therefore, that the Court need not concern itself with the question of law posed by defendant because the assumption of fact upon which defendant's brief proceeds is clearly contradicted by the evidence in the record.

B. Assuming "Complete Silence" by Defendant, His Affirmative Duty to Disclose Extended to the Representations of Third Parties

Neither party has found any precedent with respect to the precise question posed by defendant with respect to Section 12(2). It is respectfully suggested that it is impossible to hypothesize a factual situation where a plaintiff had purchased securities, could satisfy the privity requirements of Section 12(2) but yet had acquired the securities under circumstances of complete non-disclosure by anyone. This situation does not occur in the real world and, therefore, no court has ever been called upon to rule in such a situation. Although several cases and authorities have flirted with the academic issue raised by defendant, they have always found that the issues can be resolved on some other ground. Thus the authorities cited by defendant with respect to Section 10(b) of the 1934 Act and Rule 10b-5 find that liability under the statute and rule need not be resolved on such narrow

grounds because of the broader language of subparagraphs 1 and 3 of Rule 10b-5. (See, e.g., List v. Fashion Park, Inc., 340 F.2d 457, 461-62).

Perhaps the simplest answer to defendant's contention is Judge Waterman's comment in the List case (340 F.2d at 461-62):

> ". . . Furthermore, in the leading case of Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853 (1909), the Supreme Court found common law fraud by an insider in the purchase of stock from a minority shareholder, even though 'perfect silence was kept' by the defendant. Surely we would suppose that Rule 10b-5 is as stringent in this respect as the federal common law rule which preceded it. III Loss, Securities Regulation 1448-49 n.10."

It is respectfully submitted that it should also be assumed that in adopting Section 12(2) Congress intended that section to be at least as stringent as the common law rule.* Thus even at common law the courts sustained

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* Defendant cites Loss for the proposition that clause 2 of Section 17(a) of the 1933 Act and the comparable clauses in Rule 10b-5 and 15cl-2 are not expressly aimed at complete non-disclosure (III Loss at 1439). Loss, however, further comments on that page that later sections of the chapter will notice the development of special fraud doctrines based on implied representations in certain circumstances. It is respectfully submitted that Loss' comments at pages 1447-49, cited by Judge Waterman, for the proposition that Rule 10b-5 is at least as stringent as the common law rule, must be equally applied to the provisions of the 1933 Act. Unfortunately, Loss does not expressly indicate whether the special circumstances doctine of Strong v. Repide with respect to corporate insiders is one of the "special fraud doctrines" referred to earlier in the chapter or whether it should also apply to the 1933 Act.

a claim of fraud where one party to a transaction knew that the other party was relying upon a representation or state of facts which the second party knew was false or misleading. Fitzgerald v. McFadden, 88 F.2d 639 (2d Cir. 1937); Loewer v. Harris, 57 F.368 (2d Cir. 1893); Fischer v. Kletz, 266 F. Supp. 180, 184-186 (S.D.N.Y. 1967). Certainly no less a standard was intended to be imposed by Congress in mandating that a seller exercise reasonable care to prevent the omission of material information.

Although the issue was not fully articulated, there are two decisions which appear to sustain plaintiff's position that a corporate insider has a duty of affirmative disclosure even though the insider has not made affirmative representations. In Larson v. Tony's Investments, Inc., 67-69 CCH Fed. Sec. L. Rep. ¶92,324 (M.D. Ala. 1968), the court denied a motion to dismiss by a defendant director on the ground that he was not a director of the defendant corporation at the time an allegedly misleading prospectus had been issued. The court held that the focus of Section 12(2) is on the act of selling and the defendant was required to establish a lack of knowledge on his part at the time of sale of the material omissions from the prospectus (id. at p. 97,534).

Judge Gurfein also seems to have adopted this view when writing for the District Court in Jefferies & Company, Inc. v. Arkus-Duntov, 357 F. Supp. 1206 (S.D.N.Y. 1973) which held that the plaintiff had stated a claim under both Section 12 and Section 10(b) on the ground that there were sufficient facts to prohibit the defendant, an insider, from dumping his stock without disclosure of material information as to which he had notice (357 F. Supp. at 1214-15).

Despite the paucity of authority on the point, the securities law bar and the commentators have assumed that the selling shareholder's duty to correct outstanding information which the seller knows to be misleading is not limited to the seller's own prior statements. A. A. Sommer, Jr., now a member of the Securities & Exchange Commission, clearly disagrees with defendant's narrow interpretation of Section 12(2). In a panel discussion conducted by PLI in New York City on January 22 and 23, 1970, Mr. Sommer made the following comments with respect to Section 12(2) liability:

"SECTION 12(2) PROBLEMS

"MR. SOMMER: If the prospectus is materially misleading and you learn that, you have a section 12(2) problem if you sell any securities utilizing that prospectus.

"With regard to the possibility of the additional information's being misleading, I think 12(2) answers that, too. There is a reasonable investigation standard expressed in 12(2); if you sell securities and you have not made a reasonable investigation with regard to the content of the information which is contained in your selling documents, you may have a rescission action under section 12(2).

"MR. ROWE: Suppose, however, the information in the registration statement and prospectus was true and accurate as of the effective date. Additional things have occurred after the effective date of the registration statement.

"MR. SOMMER: I think 12(2) encompasses that because you have no section 11 liability. As a matter of fact, a selling shareholder as such does not have section 11 liability. He only gets that if he is a controlling person of the issuer or an underwriter. So his liability for anything that happened after the registration statement was effective but was not expressed in the prospectus would be a 12(2) problem.

"MR. GOULD: Of course, a 12(2) would be available only to the actual purchaser.

"MR. SOMMER: Yes. Privity is an element of 12(2)."

12 PLI Corporate Law Transcript Series, New Trends and Special Problems Under the Securities Laws, Chapt. XII, The Selling Security Holder and Due Diligence Review, 335, 345-46 (1970). See also, Ernest L. Folk, III, Civil Liabilities Under the Federal Securities Acts, The BarChris Case, 55 Va. L. Rev. 199, 215, 263-66 (1969).

Defendant's reading of Section 12(2) would also cause the anomalous situation illustrated by the following example. In Murphy v. Cady, 30 F. Supp. 446 (D. Me 1939), aff'd, 113 F.2d 988 (1st Cir.), cert. denied, 311 U.S. 705 (1940) the defendants were held liable even though the court indicated that the defendants believed in good faith that the representations passed on to the plaintiff were accurate. They were liable in any event because if they had exercised reasonable care they would have learned of the inaccuracies. Under defendant's proffered reading of Section 12(2), however, a defendant seller with actual knowledge that misleading information has been represented by third persons to the purchaser who deliberately and intentionally fails to disclose the additional material facts necessary to avoid misleading the seller would escape liability. Thus in the same case a party guilty of intentional misconduct would escape liability while one who had made a misleading representation in good faith could be found liable for failing to exercise reasonable care to learn that the representation was false or a half truth.*

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* Folk suggests a similar anomaly will result from a literal reading of Section 15 of the 1933 Act where the control person has actual knowledge of a misrepresentation by a controlled person who escapes liability by establishing its Section 12(2) defense (55 Va. L. Rev. at 219). Since the control person's liability is purely derivative under a literal interpretation of Section 15, a control person with actual knowledge would escape Section 11 or Section 12(2) liability if the controlled person established his defense of reasonable care. Such literal interpretations, however, serve only to defeat the broad remedial purposes of the statutes.

For each of the foregoing reasons, it is respectfully submitted that the judgment below should be reversed because, in fact, Oppenheim is not guilty of mere non-disclosure but even if he were, he had an affirmative duty to disclose the materials facts known to him.

## POINT II

## ATTORNEYS' FEES SHOULD NOT BE AWARDED OR IF AWARDED, MUST BE APPORTIONED

Defendant's argument in support of the award of attorneys' fees by the court below is summarized in his brief as follows (Oppenheim 27):

> "The mere fact that Oppenheim was forced to defend against a securities claim in order to collect on his notes does not vitiate the collection costs provision. Such a provision is enforceable whether or not the holder is compelled to seek collection by counterclaim to an action for rescission under the securities laws." (Citations omitted.)

This argument begs the question of the correct interpretation of the provision in the promissory notes upon which defendant's claim to attorneys' fees is based (Ex. I, p.2, E.231). Plaintiff does not claim that the provision in the notes is vitiated, but rather that the provision does not extend to attorneys' fees incurred to defend an action for rescission under the Federal securities laws. To award defendant attorneys' fees incurred in the defense of plaintiff's claim for rescission is to confer upon defendant a benefit for which he did not bargain and which is not included in the underlying contract. This is the precise basis on which the Court of Appeals for the

Ninth Circuit rejected a similar claim in Sackett v. Beaman, 399 F.2d 884, 892-93 (9th Cir. 1968) (Jackson 26-28).

None of the authorities cited by defendant require a different result. In Tartell v. Chelsea National Bank, 351 F.Supp. 1071, 1079 (S.D.N.Y. 1972) (Oppenheim 27), Judge Tyler recognized that the award must be based upon the language of the contractual agreement between the parties. He held that the language of the Chelsea National Bank loan agreement was broad enough to encompass the award of fees in that case, and that Tartell was not, therefore, unfairly penalized for asserting his claim under the Federal statutes, because he was charged with realization of the covenant language in his demand note (351 F.Supp. at 1079). This Court affirmed without opinion (470 F.2d 994 (1972)).

The other authorities relied upon by defendant do not consider the issue before the Court. Taylor v. Continental Supply Co., 16 F.2d 578 (8th Cir. 1926) antedates the enactment of the Federal securities laws. Jaeger v. Canadian Bank of Commerce (California), 327 F.2d 743 (9th Cir. 1964) properly supports plaintiff's position rather than defendant's argument. In Jaeger, the court was not faced with a claim under the Federal securities laws

and awarded attorneys' fees solely on the ground that it was within contemplation of the parties as found in a written contract. Indeed, when faced with the issue raised in the present case, the Ninth Circuit reached a contrary result in Sackett v. Beaman, 399 F.2d 884 (9th Cir. 1968), supra, and did not feel compelled to distinguish its earlier opinion in Jaeger.

To sustain an award of attorneys' fees in this case, at least in the amount awarded below, would have a chilling effect on the assertion by installment purchasers of legitimate claims for rescission because of the danger that a good faith claim for a modest amount may be defeated, with the consequence that plaintiff would become liable not only for his own attorneys' fees, but also those of his adversary.

Defendant makes no suggestion in his answering brief that plaintiff's claim is frivolous or that it was so characterized by the trial judge. Indeed, defendant is forced to resort to a legal argument of first impression under Section 12(2) to sustain the judgment below. Under the circumstances, it is clear that the award of attorneys' fees in the amount of $12,000 is a reward to defendant for defeating the claim of rescission, rather than an accurate

measure of defense counsel's services with respect to the prosecution of defendant's counterclaim for collection of the notes.

In conclusion, all of the authorities which have considered the question recognize that the initial determination to be made by the court is the scope of the contractual provision under which one party seeks the award of attorneys' fees. It is respectfully submitted that such provision should be narrowly construed where a more expansive reading will have a deterrent effect on the prosecution of claims under the Federal securities laws.

## POINT III

## DEFENDANT HAS RAISED SEVERAL IRRELEVANT ISSUES

Defendant's brief addresses itself to numerous factual matters which are never shown to be relevant to the legal arguments set forth in the brief. To avoid any suggestion that plaintiff agrees with the accuracy of defendant's description of those facts, plaintiff offers the following comments.

Defendant complains that plaintiff's post-trial memorandum did not refer to the Section 12(2) claim (Oppenheim 16). The Section 12(2) claim was set forth as a separate claim in the complaint (A.4,7-8); plaintiff's pre-trial memorandum discussed the appropriate authorities governing Section 12(2) liability; Judge Tenney was aware of plaintiff's continued reliance on such a separate claim and dealt with it in his opinion. Defendant cites no legal authority which would prevent plaintiff from relying on Section 12(2) in this Court. It should be obvious that plaintiff has made the sound decision that if plaintiff cannot persuade this Court to reverse in view of plaintiff's less onerous burden under Section 12(2), there would be little hope of obtaining a reversal with respect to Section 10b in view of the plaintiff's heavier burden of proof under that Section.

Defendant's reference to the billing procedure followed with respect to Anderson's professional services in preparing the purchase and sale agreement utilized not only by Jackson but also the other shareholders of the company who acquired Oppenheim's stock is another item of no relevance on this appeal (Oppenheim 14). Oppenheim was not damaged because he was selling all of his stock. None of the shareholders of this close corporation and none of the purchasers who utilized the documents prepared by Anderson complained.

Defendant states that "Oppenheim, in essence, did not 'sell' his shares to Jackson" (Oppenheim 2). The relevance of this statement in defendant's preliminary statement is never demonstrated anywhere else in the brief. To the extent that defendant is suggesting that there was no purchase or sale to satisfy the jurisdictional requirement of the securities laws, he has not supported his suggestion by either citation to the record or legal authority nor did defendant set forth such a defense in his answer to the complaint herein (A. 9-20). On the contrary, defendant affirmatively alleged in his first counterclaim that on April 7, 1970 defendant agreed to sell all of defendant's 146,183 shares of Chelsea House common stock to a group of ten individual purchasers,

including Jackson (Answer, para. 27, A. 13). Moreover, the written agreement covering Jackson's purchase from Oppenheim was made directly with Oppenheim and Jackson's promissory notes are payable directly to defendant (Ex. 5, E.89; Ex. G, E. 218; Ex. 1, E.230).

William Poten's role is also irrelevant (Oppenheim 12-13). Oppenheim does not contend that Poten ever stated to Oppenheim that Poten was representing Jackson or was keeping Jackson advised in any manner whatsoever. Whatever arrangements some of the other purchasers may have made with defendant through Poten, defendant never had any reason to believe that Poten was also representing Jackson. Defendant knew that Jackson was not a party to the side agreements made among defendant Poten and the purchasers represented by Poten (Ex. 4, E.84--Option Agreement from Steinberg, Harris, Norman, Freeman, Israel & Hanson to Poten; and Ex. D, E. 173, Indemnification Agreement from Poten to Oppenheim re commissions or fees from the purchasing shareholders). Jackson was never asked to nor did he pay any fee or commission to Poten nor did he ever authorize Poten to act for him in any way

Defendant makes reference to the fact that

Jackson was issued 12,500 shares of Chelsea House common stock contingent upon success in obtaining an underwriter and effectuating a successful public offering at the time of his election as Secretary and Director in June 1969 (Oppenheim 4). The relevance of this reference is never explained. This transaction was fully described in the registration statement filed with the Securities and Exchange Commission in July 1969 (Ex. 2, E. 14, 41) which registration statement was signed by all of the officers and directors of the corporation including defendant on July 28, 1969.

Oppenheim's reference to Chelsea's efforts to obtain E. L. Aaron & Co. as an underwriter are equally irrelevant (Oppenheim 14). If defendant means to suggest that Jackson was somehow a party to withholding material information from Oppenheim, such an allegation would be relevant only to a situation in which Oppenheim claimed to be a defrauded seller. Jackson had, in fact, advised Chelsea not to incur the expense of preparing a new registration statement because the company could not meet Aaron & Co.'s conditions (Jackson 9-10).

Defendant recites that Chelsea filed under chapter XI in July 1970 and that in a "petition filed

thereafter" Jackson swore that he had been "well acquainted" with Chelsea House's business and financial condition at all relevant times (Oppenheim 15). Defendant is referring to an application for the allowance of attorneys' fees by Rogers & Wells in the Chapter XI proceeding which was signed by Jackson on November 16, 1972, two and a half years later (Ex. F; E. 177, 215). Defendant is apparently making reference to a statement in paragraph 7 of the petition that petitioner Royall, Koegel & Wells (now Rogers & Wells) was well acquainted with the business and financial affairs of Chelsea because of its representation of Chelsea in connection with its efforts to effectuate a public offering for Chelsea securities. Obviously Jackson and the other attorneys who worked on that registration statement were required to become familiar with the financial statements and condition of the company covered by that registration statement filed in July 1969. No further services were rendered by Jackson, Anderson or any other attorney with respect to the registration statement after October 1969 (Jackson 8-9). To read the statement in paragraph 7 of the November 19, 1972 petition as an admission by Jackson that he was well acquainted as an investor with the material information available to Oppenheim in March and

April 1970 which Oppenheim failed to disclose to Jackson highlights the bankruptcy of defendant's legal position.

Defendant's brief also discusses plaintiff's role in the discussions with underwriters in the summer and fall of 1969 (Oppenheim 4), plaintiff's supervision of the preparation of a registration statement and prospectus filed in June 1969 (Oppenheim 4-6), the October 31, 1969 financial statement sent to Jackson in 1970 (Oppenheim 7-8) and the fact that in early 1970 Oppenheim was openly critical of Chelsea management and made no effort to conceal his memorandum (Oppenheim 9-12). This discussion of what facts were known to Jackson and what other facts Jackson might have learned if he made inquiry are irrelevant in consideration of a Section 12(2) claim. Under Section 12 it is irrelevant that plaintiff had access to certain facts so long as he lacked actual knowledge of those facts.

As this Court noted in Dale v. Rosenfeld, 229 F.2d 855, 858 (2d Cir. 1956): "Availability elsewhere of truthful information cannot excuse untruths or misleading omissions in the prospectus. 'Readiness and willingness to disclose are not equivalent to disclosure.'"

Moreover, defendant cannot argue under Section 12(2) that his material omissions are irrelevant because Jackson would have purchased his stock in any event in light of what Jackson did know already. As indicated by this Court in DeMarco v. Edens, 390 F.2d 863, 841 (1968), to weigh the impact of the material omissions upon the purchaser's investment decision would be to erroneously introduce an element of reliance into the construction of Section 12(2).

CONCLUSION

For each of the foregoing reasons, plaintiff respectfully requests that the judgment below be reversed (Jackson 31-32).

Dated: New York, New York
December 16, 1975

Respectfully submitted,

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